Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5010

ALPHONSE BIFULCO,

Petitioner,

—v.—

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 2, 1979
CERTIORARI GRANTED OCTOBER 9, 1979

In the Supreme Court of the United States

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INDEX

	Page
Extract of Relevant Docket Entries	1
Petitioner's Motion to Vacate Sentence	3
District Court Memorandum of Decision and Order dated January 19, 1979	7
District Court Judgment dated January 23, 1979	8
Addendum to the District Court Decision dated January 29, 1979	9
Judgment of the Court of Appeals dated May 30, 1979	10
Opinion of the Court of Appeals dated May 30, 1979	11
Order of the Court Granting Petitioner's Motion for Leave to Proceed *In Forma Pauperis* and Granting Certiorari	18

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

76 Cr. 822 and 79 C 148

UNITED STATES OF AMERICA

—*v.*—

ALPHONSE BIFULCO

EXTRACT OF RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
12/30/76	Before U.S. Magistrate Cattogio—Indictment filed, bench warrant ordered and issued.
1/7/77	Before Costantino, J.—Case called. Defendant present without attorney. Defendant arraigned and court enters plea of not guilty on his behalf. Bail set at $50,000 cash. Court appoints attorney for defendant and orders all motions filed by February 10, 1977. Trial set for February 28, 1977.
3/14/77	Before Costantino, J.—Case called. Defendant and attorney present. Trial ordered and begun, jurors selected and sworn. Trial continued to March 15, 1977.
3/30/77	Before Costantino, J.—Case called. Trial resumed. Jury returns with verdict of guilty as charged. Government motion to remand defendant denied as indicated. Jury discharged. All motions to be made on sentencing date. Sentence adjourned without date. Trial concluded.
6/3/77	Before Costantino, J.—Case called. Defendant and counsel present. Defendant sentenced for a period of four years and a special parole term of five years, and a fine of $1,000. Court grants defendant leave to appeal without prepayment of fee. Judgment and commitment filed, with certified copies to U.S. Marshal and Probation Department.

DATE	PROCEEDINGS

6/10/77 Notice of appeal filed.

12/27/77 Court of Appeals mandate dated December 15, 1977, affirming judgment of the district court, received and filed.

1/17/79 Defendant Bifulco's motion to vacate sentence pursuant to 28 U.S.C. § 2255 filed. Copy of docket entries forwarded to chambers.
Defendant Bifulco's motion for leave to proceed *in forma pauperis* filed.

1/22/79 By Costantino, J.—Memo and order dated January 19, 1979, dismissing the complaint, filed.

1/23/79 Judgment dismissing the complaint and denying petitioner's motion pursuant to 28 U.S.C. § 2255 filed.

1/29/79 Motion to proceed without funds *re*: 28 U.S.C. § 2255 petition and notice of appeal filed.

1/30/79 Motion to appeal *in forma pauperis* from denial of 28 U.S.C. § 2255 petition granted and notice of appeal filed. Copies of Docket sheets and notice of appeal forwarded to Court of Appeals.
By Costantino, J.—Addendum to January 19, 1979, decision, dated January 29, 1979, filed.

3/7/79 Record on appeal certified and mailed to Court of Appeals (28 U.S.C. § 2255 portion only).

6/28/79 Mandate of Court of Appeals affirming judgment, with copy of opinion *re*: 28 U.S.C. § 2255, received and filed. (Court of Appeals opinion dated May 30, 1979.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

79 C 148

Criminal # 76-CR-822

COSTANTINO, J.

UNITED STATES OF AMERICA

vs.

ALPHONSE BIFULCO

MOTION TO VACATE SENTENCE

PETITIONER, ALPHONSE BIFULCO, envokes [sic] jurisdiction of the Honorable Court under Title 28 U.S.C. 2255.

That the petitioner was sentenced in the District Court on June 3, 1977 before the Honorable Judge Constantine [sic]. Petitioner was found Guilty at his trial of one count of Violation of Title 21 U.S.C. 846. Petitioner further states that he filed a Rule 35 motion to the court, which was denied by the Honorable Court on September 29, 1977. The petitioner now proceedes [sic] as follows:

Petitioner was charged in a multi count indictment with four (4) Co-defendants, including himself, who were finally taken to trial. [P]etitioner was originally charged with three (3) counts on that indictment, two (2) of the counts charged the petitioner with violation of Title 21 USC 841, and the third (3rd) count charging a violation of Title 21 USC 846. The petitioner went to trial, and the Jury returned a verdict of guilty on one (1) count of conspiracy under Title 21 USC 846.

The petitioner would like to state at this time that he was sentenced to four (4) years and a five (5) year Special Parole by the Court. Under the holdings of *Fassette* v. *U.S.*, 444 F. Supp. 1245, (1978), THAT he was indeede [sic] sentenced illegally.

The petitioner was sentenced to a four (4) year sentence with a three [sic] (5) year Special Parole to follow, as is allowed in Title 21 U.S.C. 841(a). However, the petitioner was sentenced illegally as he was found guilty of violation of Title 21 USC 846. Petitioner contends that, as in *Fassette supra*, the crime of which the petitioner was convicted was not a substantive of manufacturing or distributing, of which the petitioner was freed, as is punishable under section 841(a) but only a conspiracy to do these things. Such a conspiracy is not punished under Section 841(a) but under section 846. Such conspiracy is made a seperate [sic] offense under Section 846 and the punishment for such a conspiracy is seperately [sic] prescribed by 21 U.S.C. 846.

The punishment for substantive offenses punishable under 21 usc 841(a)(1) is the subsection set forth in the petitioners case. For the substantive offense involving P.C.P. the punishment is subscribed as a term of imprisonment not to exceede [sic] 15 years or $15,000.00 fine or both. The same punishment goes on to describe and provide that any Court imposing a term of imprisonment, shall also impose a special parole term of at least two (2) years. The operative language is as follows:

> "Any sentence imposing a term of imprisonment under this paragraph, shall . . . impose a special parole term of at least two (2) years *in addition* to such term of imprisonment. . " (ITALICS SUPPLIED)

So, if any imprisonment is imposed for the substantive offense, the Special Parole term is mandated in addition to the imprisonment. However, 21 USC 846 is quite different in its language. [T]his section in relevant part reads

> "Any person who conspires to commit any offense defined in this subchapter (which subchapter includes 841) is punishable by *imprisonment, or fine or both, which may not exceede* [sic] *the maxium* [sic] *punishment perscribed* [sic] *for the offense,* THE COMMISSION OF WHICH WAS THE OB-

> JECT OF THE . . . *CONSPIRACY*". (ITALICS SUPPLIED)

The clear meaning as the court interperted [sic] it, of 846, is that the punishment for 846, for violation of that section shall consist only of "imprisonment, fine, or both". A special parole term of the type perscribed [sic] in 841 is punishment in addition to imprisonment and or fine[.] Section 841 Speciffically [sic] refers to such special parole terms as something "In Addition" to imprisonment.

The court further went on to state that "a statute providing punishment for a criminal offense should be strictly construed.["] It cannot be doubted that a special parole term which follows a term of imprisonment is a significant additional detriment of and to the defendant. The court found no language tha[t] is in 846, which would permit any kind or type of punishment or detriment which is additional to fine or imprisonment or both. The court found no language in that section which wuld [sic] authorize imposing a special parole thereunder.

The words of 846 "Which may not exceede [sic] the maxium [sic] punishment perscribed [sic] for the (substantive) offense" modify the words "punishable by imprisonment fine or both". The court read the reference to the "Maxium [sic] punishment perscribed [sic] for the (substantive) offense" as referring to the maximum [sic] fine and imprisonment perscribed [sic] for the substantive offense. The court interpreted 846 as not permitting all of the types and kinds of substantive offenses and punishment for such offenses, but as permitting only fine and imprisonment which shall not exceede [sic] the maxium [sic] fine and imprisonment perscribed [sic] for the substantive offense.

If Congress had intended or so desired to have the permissable [sic] punishment for the conspiracy offense of 846 identical with that permitted for the substantive offense of 841, it could have easily and clearly declared it so. Instead, Congress had used language in 846 which seperately [sic] defines the permissable [sic] punishment for violations of that section and uses different language in defining it.

Further, the petitioner requests that this motion be granted in every respect.

CONCLUSION

Wherefore, since any doubt or conflict in the construction of the Statutes and rules must be resolved in favor of the petitioner, or since the District Court Lacked Jurisdiction to convict and sentence the petitioner, The petitioner prays that the information and indictment be dismissed; that the conviction be reversed; that the pleas be dismissed; that the Honorable Court issue Habeas Corpus forthwith, thus releasing the petitioner from his illegal restraint.

Respectfully submitted,

/s/ Alphonse Bifulco Pro-Se
ALPHONSE BIFULCO PRO-SE
Pembroke Station
Danbury Conn. 06810

Pursuant to Title 28 U.S.C. SECTION 1746, I declare under the penalty of perjury that the foregoing is true and correct. Executed on the 14th day of January, 1979.

/s/ Alphonse Bifulco
ALPHONSE BIFULCO

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

79 C 148
(76 CR 822)

ALPHONSE BIFULCO, PLAINTIFF

—against—

UNITED STATES OF AMERICA, DEFENDANT

MEMORANDUM OF DECISION AND ORDER

Dated January 19, 1979

Filed January 22, 1979

COSTANTINO, D.J.

Petitioner was convicted pursuant to 21 U.S.C. § 846 of conspiring to violate 21 U.S.C. § 841(a)(1). He was sentenced to 4 years in prison with a 5 year special parole term. He now moves pursuant to 28 U.S.C. § 2255 to vacate or correct his sentence. The motion is denied. The court finds that defendant was properly sentenced. *See United States* v. *Armedo-Sarmiento*, 545 F.2d 785 (2d Cir. 1976), *cert. denied*, 430 U.S. 917 (1977) (5 years and 3 year special parole term); *United States* v. *Wiley*, 519 F.2d 1348 (2d Cir. 1975), *cert. denied*, 423 U.S. 1038 (1976) (7 years and 3 year special parole term). *See also United States* v. *Jacobson*, 578 F.2d 863 (10th Cir. 1978). Accordingly, the Clerk of the Court is directed to dismiss the complaint.

So ordered.

/s/ Mark A. Costantino
U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

79 C 148
(76 CR 822)

ALPHONSE BIFULCO, PLAINTIFF

—against—

UNITED STATES OF AMERICA, DEFENDANT

JUDGMENT

Filed January 23, 1979

A memorandum and order of Honorable Mark A. Costantino, United States District Judge, having been filed on January 22, 1979, denying the petitioner's motion pursuant to 28 U.S.C. Sec. 2255, and dismissing the complaint, it is

ORDERED and ADJUDGED that the plaintiff take nothing of the defendant; that the petitioner's motion pursuant to 28 U.S.C. Sec. 2255 is denied; and that the complaint is dismissed.

Dated: Brooklyn, New York
January 23, 1979

/s/ Richard H. Weare
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

79 C 148
(76 CR 822)

ALPHONSE BIFULCO, PLAINTIFF

—against—

UNITED STATES OF AMERICA, DEFENDANT

ADDENDUM

Dated January 29, 1979

Filed January 30, 1979

COSTANTINO, D.J.

The eleventh line to the January 19, 1979 decision of this court should include a citation to *United States* v. *Burman*, 584 F.2d 1354 (4th Cir. 1978) following the citation to *United States* v. *Wiley*, 519 F.2d 1348 (2d Cir. 1975), *cert. denied*, 423 U.S. 1038 (1976).

So ordered.

/s/ Mark A. Costantino
U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of May one thousand nine hundred and seventy-nine.

Present: HON. MURRAY I. GURFEIN
Circuit Judge

HON. THOMAS J. MESKILL
Circuit Judge

HON. CHARLES EDWARD WYZANSKI
District Judge

79-2024

Filed May 30, 1979

ALPHONSE BIFULCO, PETITIONER-APPELLANT

—*v.*—

UNITED STATES OF AMERICA, RESPONDENT-APPELLEE

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. DANIEL FUSARO
/s/ Arthur Heller
By: ARTHUR HELLER
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 954—August Term, 1978

(Submitted April 30, 1979 Decided May 30, 1979)

Docket No. 79-2024

ALPHONSE BIFULCO, PETITIONER-APPELLANT

—*v.*—

UNITED STATES OF AMERICA, RESPONDENT-APPELLEE

Before:

GURFEIN and MESKILL, *Circuit Judges*, and
WYZANSKI, *District Judge* *

Appeal *pro se* from an order of the United States District Court for the Eastern District of New York, Mark A. Costantino, *Judge*, denying motion for relief under 28 U.S.C. § 2255. The Court of Appeals held that the trial court neither lacked subject matter jurisdiction over appellant's conviction under 21 U.S.C. § 846 nor imposed an illegal sentence under that section.

Affirmed.

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* Hon. Charles E. Wyzanski, Jr., United States District Judge for the District of Massachusetts, sitting by designation.

ALPHONSE BIFULCO, Danbury, Connecticut (Robert E. Winkle, Danbury, Connecticut, on the brief), *for Appellant Pro Se.*

EDWARD R. KORMAN, United States Attorney, Eastern District of New York, Harvey M. Stone, Rodney G. Smith, Assistant United States Attorneys, Eastern District of New York, *for Appellee.*

PER CURIAM:

This is an appeal *pro se* from an order of the United States District Court for the Eastern District of New York, Mark A. Costantino, *Judge*, denying appellant Alphonse Bifulco's motion for relief pursuant to 28 U.S.C. § 2255. We regard appellant's two claims on appeal as meritless and we affirm the order entered below.

Appellant was indicted on three drug-related counts, one count charging him under 21 U.S.C. § 846 with conspiracy to manufacture, distribute, and possess with intent to distribute substantial quantities of phencyclidine, a Schedule III controlled substance, in violation of 21 U.S.C. § 841(a)(1), and the other two counts charging him with substantive violations of § 841(a)(1). After a jury trial, appellant was convicted on the conspiracy charge and acquitted on the substantive charges. On June 3, 1977, he was sentenced to four years' imprisonment, a special parole term of five years and a $1,000 fine. This Court affirmed his conviction without opinion on December 15, 1977. Subsequently appellant, *pro se*, moved to vacate his sentence under 28 U.S.C. § 2255. The motion was denied by the district court and this appeal followed.

Appellant presents two claims for our consideration. The gist of the first argument is that the trial court lacked subject matter jurisdiction over his trial and conviction on the conspiracy count, in the absence of evidence proving a substantive offense as the object of the conspiracy, on the theory that no offense against the

United States had been proven. As this argument attacks the jurisdiction of the trial court, we will overlook appellant's failure to raise this objection in the § 2255 motion presented to the district court. Reaching the merits, we must reject appellant's argument as utterly without foundation. Congress explicitly defined conspiracy under § 846, standing alone, as a federal crime. A defendant need not be charged with any other violation in order to be tried and convicted under § 846. *See, e.g., United States* v. *Lyles*, 593 F.2d 182 (2d Cir.), *cert. denied*, 47 U.S.L.W. 3636 (U.S. Mar. 26, 1979). Moreover, a defendant charged with both a § 846 conspiracy and a substantive violation of § 841 may be lawfully convicted on the former and acquitted on the latter. *See, e.g., United States* v. *Lubrano*, 529 F.2d 633 (2d Cir. 1975), *cert. denied*, 429 U.S. 818 (1976). *See generally Callanan* v. *United States*, 364 U.S. 587 (1961) (noting distinctiveness of conspiracy to commit a particular offense and actual commission of that offense).

Appellant's second contention, which was raised below, is that the imposition on him of a special parole term, in addition to incarceration, is an impermissible expansion of the sentencing provisions of 21 U.S.C. § 846. We disagree.

Section 846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by *imprisonment or fine or both* which may not exceed the *maximum punishment* prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(emphasis added). Appellant argues in his brief that the "maximum punishment" spelled out in § 846 refers to the maximum imprisonment or fine prescribed for violations of the substantive offenses covered by 21 U.S.C. § 841(b). He claims that the legislative history demonstrates a congressional intent to exclude the special parole mandated by 21 U.S.C. § 841(b). Therefore, he reasons, the addition of a period of special parole to his sentence of imprisonment and fine was an illegal sentence under 21 U.S.C. § 846. The only authority we have found that sup-

ports appellant's interpretation of the sentencing provisions of § 846 is *Fassette* v. *United States*, 444 F.Supp. 1245 (C.D. Cal. 1978). The *Fassette* court interpreted § 846 as "not permitting all of the types and kinds of punishment prescribed for the substantive offense but permitting only fine and imprisonment which shall not exceed the maximum fine and imprisonment prescribed for the substantive offense." *Id.* at 1247 (footnote omitted). The court's expressed hope that the Ninth Circuit would rule on the issue, *id.* at 1248, has gone unfulfilled.

The weight of authority is to the contrary. In *United States* v. *Armedo-Sarmiento*, 545 F.2d 785, 794-95 (2d Cir. 1976, *cert. denied*, 430 U.S. 917 (1977), and *United States* v. *Wiley*, 519 F.2d 1348, 1351 (2d Cir. 1975), *cert. denied*, 423 U.S. 1058 (1976), we gave our implicit approval to the type of sentencing challenged here without discussing or ruling on the claim raised by the appellant here. The Fifth Circuit in *United States* v. *De La Fuente*, 550 F.2d 309 (5th Cir. 1977), similarly gave its tacit approval to a sentence containing a special parole term for a violation of § 846 without considering the argument proffered here.

In addition, the two circuit courts that have directly addressed this issue have both rejected the reasoning adopted in *Fassette* and urged upon us here by appellant. In *United States* v. *Burman*, 584 F.2d 1354, 1358 (4th Cir. 1978), the court stated:

> We think that a special parole term for violation of § 846 was properly included in Burman's sentence. The conspiracy statute, § 846, is punishable by a sentence which must be set by reference to the penalties of the substantive offense statute. A special parole term is automatically made part of the sentence prescribed by the substantive offense statute, § 841(b), anytime imprisonment is included in the sentence. We think that under this statutory scheme such a special parole term is required as a penalty under § 846 when a sentence of imprisonment is imposed because the substantive [offense] statute, § 841(b), would so require it and the terms "imprisonment or fine or both" only have meaning by reference to the sentences imposed under substantive offense statutes. Because we do not find Burman's special parole term of fifteen years to be excessive, we hold that the position of a special parole term of fifteen years by the district court for violation of § 846 was proper.

The Tenth Circuit relied on a similar analysis in rejecting the interpretation pressed here by the appellant:

> From the wording in § 841(b)-(c), it would appear that Congress viewed the special parole term as being a part of the term of imprisonment to which it was appended. Paragraphs (1) to (3) of § 841(b) all make a special parole term mandatory whenever imprisonment is also imposed. Thus, a parole term may never be imposed without imprisonment; it must always accompany imprisonment. Section 841(c) provides, in addition, that violation of the special parole may result in an increase in the original term of imprisonment to the extent of the length of the special parole term. It is impossible, therefore, to accept the argument that the parole term is to be imposed only where the charge is violation of the substantive provision. It is logical to view the reference to imprisonment in § 846 as intending to incorporate all of the imprisonment provision in § 841(b).

United States v. *Jackson*, 578 F.2d 863, 868 (10th Cir. 1978).

We note too that in a closely analogous case, *United States* v. *Dankert*, 507 F.2d 190 (5th Cir. 1975), the Fifth Circuit upheld the imposition of a special parole term in addition to imprisonment under 21 U.S.C. § 963. Section 963 prohibits conspiracy to import, rather than manufacture, controlled substances; the corresponding substantive sections, §§ 952(a)(1) and 960(b)(1), punish the actual importation of these substances, and as such, they are companion sections to the substantive offense section involved in the instant appeal. In *Dankert* the appellant made the argument, similar to that advanced

by appellant Bifulco, that § 963 does not include the special parole term provision of § 960(b)(2). Section 963 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by *imprisonment or fine or both* which may not exceed the *maximum punishment* prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(emphasis added). The *Dankert* Court rejected the interpretation proffered by appellant:

> The punishment provision of § 963 must be considered in light of §§ 952(a) and 960, since it is these statutes which define the offense which was the object of the conspiracy, and provide for punishment therefor. They provide:
>
> § 952(a) It shall be unlawful to import . . . [certain] controlled substance[s] . . . .
>
> * * * *
>
> § 965(a)(1)
>
> Any person who—
>
> contrary to section 952, 953, or 957 of this title, knowingly or intentionally imports or exports a controlled substance,
>
> * * * *
>
> shall be punished as provided in subsection (b) of this section.
>
> § 960(b)(1)
>
> In the case of a violation under subsection (a) of this section with respect to a narcotic drug in schedule I or II, the person committing such violation shall be imprisoned not more than fifteen years, or fined not more than $25,000, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall include a special parole term of not less than three years in addition to such term of imprisonment.
>
> * * * *

> We have no trouble whatever in understanding the language of § 963 to permit pnishment not exceeding that provided for an offense in violation of § 952(a).

Id. at 191.

We agree with the position taken by the Fourth, Fifth and Tenth Circuits on this issue. Therefore, we affirm the order of the district court denying appellant's § 2255 motion.

SUPREME COURT OF THE UNITED STATES

No. 79-5010

ALPHONSE BIFULCO, PETITIONER

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

On Consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 9, 1979

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